

APPEAL NO. 031932
FILED SEPTEMBER 2, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 30, 2003. With regard to the only issue before her, the hearing officer determined that the appellant (self-insured) is not entitled to contribution of impairment income benefits (IIBs) and supplemental income benefits (SIBs) due to an earlier compensable injury.

The self-insured appeals, contending that "there is no cumulative impact," that the respondent (claimant) "has been rated multiple times for the same impairment," and that it is entitled to 100% contribution. The claimant responds, pointing out that there was no medical evidence for a cumulative impact analysis and urges affirmance.

DECISION

Affirmed.

Section 408.084 provides that the Texas Workers' Compensation Commission (Commission) may order a reduction in IIBs and SIBs "in a proportion equal to the proportion of a documented impairment that resulted from earlier compensable injuries." In determining the reduction in benefits because of contribution of a prior compensable injury, the Commission is to consider the "cumulative impact of the compensable injuries on the employee's overall impairment" Section 408.084(b).

In evidence is an October 1991 judgment by a County District Court awarding the claimant \$42,000 for a compromise settlement. Although the self-insured represents that the settlement was for a low back "old law" workers' compensation injury, there is no medical evidence regarding the extent of that injury or documented impairment.

The claimant subsequently had an _____, low back injury and received an 11% impairment rating (IR) pursuant to the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (3rd edition) for that injury in November 2000. The 11% IR was based on a 5% impairment from Section (II)(B) of Table 49 and a 6% impairment for loss of range of motion (ROM). An MRI after the April 1999 injury showed a small protrusion at L3-L4, a more prominent protrusion at L5-S1, and a small annular tear at L5-S1. The claimant subsequently had another low back injury on (subsequent date of injury), which eventually resulted in a 10% IR under the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (4th edition). The claimant was assessed as DRE Lumbosacral Category III with EMG evidence documenting radiculopathy. The hearing officer found, and it is undisputed, that the medical records did not contain a cumulative impact analysis of the compensable injuries on the claimant's overall impairment and there was

no attempt to correlate the 4th edition rating with the 3rd edition rating. The self-insured only points out that the claimant received a 10% IR for a (subsequent date of injury) low back injury where he had previously received an 11% IR for the _____ low back injury and therefore it should receive 100% contribution. The claimant contends that the IR for the _____ injury had a specific disorder rating component and a ROM component while the IR for the (subsequent date of injury) injury was for DRE Category III with radiculopathy and there was no medical evidence how these injuries work together or the cumulative impact of the injuries, if there was an overlap.

The hearing officer comments that the self-insured had the burden of establishing the contribution and presenting evidence of a cumulative impact analysis addressing how the injuries interplay. In Texas Workers' Compensation Commission Appeal No. 971838, decided October 17, 1997, the Appeals Panel cited its concern over the lack of medical evidence explaining how the injuries work together or the cumulative impact of the injuries. We note that same concern in this case. In Texas Workers' Compensation Commission Appeal No. 021820, decided August 28, 2002, we cited Texas Workers' Compensation Commission Appeal No. 971348, decided August 28, 1997, as stating

[W]here the effect of a second injury is to essentially obliterate the effects of a first injury, there can be no "contribution." [T]he analysis of cumulative effect must be made by taking the current condition and then "working back," not by taking the person at his previously uninjured state and working forward. See Texas Workers' Compensation Commission Appeal No. 941338, decided November 22, 1994.

There was no evidence whether the second (subsequent date of injury) injury "obliterated" the effects of the _____ injury, there was no cumulative impact analysis as required by Section 408.084(b), and there was no effort to correlate the 4th edition and 3rd edition ratings.

We have reviewed the complained-of determinations and conclude that the hearing officer's determinations are not so against the overwhelming weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**MANAGER
(ADDRESS)
(CITY), TEXAS (ZIP CODE).**

Thomas A. Knapp
Appeals Judge

CONCUR:

Margaret L. Turner
Appeals Judge

Edward Vilano
Appeals Judge